

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOVA TELECOM, INC.,	:	CIVIL ACTION
NOVA TELEMARKETING, INC. d/b/a	:	
COMMERCE TELESERVICES, INC. and	:	
HEIDER COMMUNICATIONS, INC.	:	
	:	
v.	:	
	:	
LONG DISTANCE MANAGEMENT	:	
SYSTEMS, INC., RSL COM USA, INC.,	:	
as Successor to LONG DISTANCE	:	
MANAGEMENT, INC., and in its	:	
own right, LOU STEINER, ONE	:	
STEP BILLING, INC., NEIL	:	
SOLLINGER, TOM MCCROSSEN and	:	
PROMARK COMMUNICATIONS, INC.	:	
a/k/a MADISON COMMUNICATIONS, INC.	:	NO. 00-2113

MEMORANDUM AND ORDER

HUTTON, J.

October 25, 2000

Presently before this Court are Defendants RSL COM U.S.A., Inc. and LDM Systems, Inc.'s (collectively, the "Defendants") Motion to Dismiss all of the Counts of Plaintiffs' Complaint (Docket No. 4), Plaintiffs' Reply to Defendants' Motion to Dismiss (Docket No. 11) and Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss Plaintiffs' Complaint (Docket No. 15). For the reasons stated below, the Motion is **DENIED**.

I. BACKGROUND

Upon accepting as true the facts alleged in the Complaint and all reasonable inferences that can be drawn from them, the

pertinent facts of this case are as follows. Plaintiff Nova Telecom, Inc.'s ("NTI")¹ primary business is in the telecommunications industry. NTI is a Nevada corporation and has a principal place of business in Pennsylvania. NTI is a reseller of long distance telephone services. NTI purchases long distance services from long distance carriers through an affiliated company, Nova Communications Group ("NCG"). NCG purchases long distance services from long distance carriers and receives substantial discounts, which depend on a minimum monthly volume of traffic being placed on the carrier's network. NTI sells long distance services directly to the public through its agents and/or independent contractors principally through the solicitation of Verbal "L.O.A."s or "letters of agency."

Mr. Ronald McKay and Frank Squilla of NTI were introduced to Defendants Neil Sollinger ("Sollinger")² and Tom McCrossen ("McCrossen")³ at a trade show which occurred in San Antonio, Texas in March of 1997. At the time, Sollinger was Vice President of Special Projects at LDM and introduced McKay and Squilla to a project he was working on that included "Verbal L.O.A" solicitations. In May 1997, in Valley Forge, Pennsylvania, Lou

¹ NTI is incorporated under the laws of Nevada and has its principal place of business at 914 McKean Street, Philadelphia, Pennsylvania 19148.

² Sollinger is a resident of the State of Florida.

³ McCrossen is a resident of the State of New York.

Steiner ("Steiner")⁴ introduced Plaintiff NTI to the Verbal L.O.A. program that Long Distance Management, Inc. ("LDM")⁵ had been operating. At the time, Steiner advised he would prepare spreadsheets which would accurately reflect the success of LDM's experience with the Verbal L.O.A. solicitation method and its advantage over the more widely used written contract method of solicitation.

In July of 1997, Sollinger traveled from Florida to Philadelphia, Pennsylvania to attend a trade show where he personally presented Excel spreadsheets prepared by Steiner reflecting the actual performance and success of LDM's "One Step Billing" program. At that time, Sollinger also introduced to McKay of NTI to the One Step Billing program and he also orally confirmed the veracity of the data contained in the Excel spreadsheets.

During this time period, Tom McCrossen made three visits to the Philadelphia area during which he attested to the data provided by Steiner and Sollinger. McCrossen also provided his own pro formas which corroborated the data in the spreadsheets.

⁴ Steiner is a resident of the State of Florida.

⁵ Long Distance Management Systems, Inc., as successor to LDM, is incorporated under the laws of Delaware and has its principal place of business in New York State.

Also, in July 1997, Defendants One Step Billing, Inc. ("OSBI")⁶, LDM and Promark Communications, Inc. ("Promark")⁷ presented NTI with proprietary materials in a binder pertaining to the OSBI Program during a presentation of the One Step Billing program in Florida. Among that material were spreadsheets prepared by Defendant Steiner and other information concerning the historical performance of Promark and the Verbal L.O.A. program. As a result of proposals and presentations by Defendants Sollinger, McCrossen, Steiner, OSBI, LDM and Promark, NTI became involved in LDM's "One Step Billing Program."

NTI contractually engaged Nova Telemarketing, Inc. ("NTM")⁸ and Heider Communications, Inc. ("Heider")⁹ to sell the One Step Billing Program. NTI began selling the Verbal L.O.A. program for OSBI in August of 1997.

In December 1997, NTI began receiving data indicating that commissions it received had fallen below expectations that were based on information provided by Defendants. In particular, many

⁶ OSBI is incorporated in the State of Florida and has its principal place of business in Florida.

⁷ Promark is incorporated in the State of Florida and has its principal place of business in Florida.

⁸ NTM is incorporated under the law of Nevada and has its principal place of business at 914 McKean Street, Philadelphia, Pennsylvania 19148.

⁹ Heider is incorporated in the State of Colorado and has its principal place of business in Colorado.

customer referrals or "ANIs"¹⁰ were documented as pending. Despite having been advised by OSBI and LDM that NTI had unrealistic expectations, NTI had never had any independent expectations of the industry. NTI's expectations were solely based upon the information and assurances provided by OSBI, Promark and LDM through Sollinger and Steiner. Sollinger and Steiner represented that they had knowledge of actual performance of the Verbal L.O.A. program, which was relatively unique in the industry.

In May 1998, creditors of NTI forced it into a Chapter 7 bankruptcy proceeding in Las Vegas, Nevada which was converted into a Chapter 11. In July 1998, OSBI and LDM ceased reporting and remittance obligations. On or about June 1, 1999 OSBI commenced a civil action against LDM and RSL COM USA, Inc. ("RSL")¹¹ in United States District Court for the Southern District of New York. The Complaint alleges that RSL and LDM had converted and concealed millions of dollars in assets generated by the agents and sub-agents of OSBI, which include the Plaintiffs. In that case, OSBI represented itself as the victim of the Defendants' unlawful conversion and concealment of assets.

In October 1998, Defendant RSL acquired the entire customer base of OSBI for \$15.1 million. This acquisition included

¹⁰ The term ANI literally means an "automatic number identification." The term relates to the number of a telephone line, which the holder has authorized a transfer to OSBI as the long distance carrier.

¹¹ RSL is incorporated in either New York or Delaware and has its principal place of business in New York.

compensation owed NTI for its ANIs. OSBI, however, only reported \$5.25 million as the purchase price on its corporate tax returns. Substantial sums of money from this sale were syphoned out by LDM and OSBI into the personal accounts of Sollinger and Steiner. At least \$1 million was given to Defendant Steiner for reimbursement for unwritten loan agreements. Further, Defendant Sollinger took in excess of \$3 million from OSBI.

Through litigation in Federal bankruptcy Court, NTI learned that the representations of Defendants Sollinger, Steiner and the Corporate Defendants were false as to the performance of the Verbal L.O.A. program. NTI also learned that a number of ANIs or new customers generated by the Plaintiffs were unaccounted for or were listed as "pending," "rejected," or "billing but not passing traffic." Plaintiffs have learned that LDM obtained millions of dollars in OSBI ANIs.

Plaintiffs believe these facts reveal a pattern of behavior designed convert assets of the Plaintiffs, namely the new customers. The scheme began when the Defendants provided NTI with false information in order to induce NTI to enter into a contract to sell the OSBI Program and to engage NTM and Heider. LDM and OSBI took the assets of NTI in order to promote the interests of Defendants Sollinger and Steiner, with Sollinger and Steiner having the power and authority to manipulate the corporate forms of the Defendants. Plaintiffs assert that the goal of the scheme was to

make OSBI and LDM attractive to RSL so that it would purchase them. RSL in fact did purchase OSBI's entire customer base in October 1998 for \$15.1 million.

At all times pertinent to the claims in this Complaint, OSBI and LDM failed to provide accurate reporting through which commission could be appropriately assigned to OSBI and its sub-agents. OSBI maintained that it did not know whether LDM was making proper remittances. Plaintiffs assert that OSBI made these representations knowing they were false because at the time they were made, OSBI had sold its customer base to LDM.

Plaintiffs further assert that records produced in discovery by court order of the Bankruptcy Court demonstrate that OSBI held back reports during its settlement negotiations in the bankruptcy. Plaintiffs allege that this withholding resulted in a settlement based on false pretenses and was entered into without knowledge that OSBI has acted with LDM to steal Plaintiffs' customers. Plaintiffs also assert that LDM and OSBI have taken "phantom deductions" from the amount OSBI obligated itself to pay NTI through the approved settlement in the bankruptcy agreement. Plaintiffs further claim that Defendants Sollinger and Steiner syphoned all corporate assets from OSBI and abandoned its obligations to NTI in the Court approved settlement. The ability of Sollinger and Steiner to control the corporate Defendants is demonstrated by the fact that at various times, Sollinger and

Steiner personally funded and controlled the day to day financial affairs of OSBI. Finally, the Plaintiffs claim that the purchase of OSBI assets by RSL resulted in a \$3 million payment to Defendant Sollinger.

Plaintiffs filed the instant lawsuit on March 29, 2000, in the Court of Common Pleas, Philadelphia County. The lawsuit was subsequently removed to this Court by Defendants LDM and RSL on April 28, 2000.

Plaintiffs' Complaint consists of several counts. Count I alleges common law fraud. Count II alleges conspiracy to defraud. Count III alleges tortious interference with contractual relations. Count IV alleges civil conspiracy to tortiously interfere. Count V alleges unlawful conversion of assets. Count VI alleges civil conspiracy to convert Plaintiffs' assets. Count VII alleges third party beneficiary breach of contract and Count VIII alleges conspiracy to cheat, hinder and delay Plaintiff NTI's collection of court approved judgment in Bankruptcy Court proceeding.

In response to Plaintiffs' Complaint, Defendants RSL and LDM filed this Motion to Dismiss. The motion raises several issues. First, Defendants argue that NTI's status as a Chapter 7 debtor precludes its claims. Second, NTI's settlement with OSBI precludes Plaintiffs' Claims. Third, Plaintiffs' have failed to state a claim against either RSL or LDM. Finally, Defendants argue Plaintiffs have not sufficiently alleged any basis to impose

liability upon either RSL or LDM for the purported action of the other Defendants.

II. STANDARD OF REVIEW

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6)¹², this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990) (citing *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988)); see also *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). A court will only dismiss a complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc.*, 492 U.S. at 249-50. Nevertheless, a court need not credit a plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. See *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Moreover, "a court may consider an

¹²Rule 12(b)(6) provides that "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted" FED. R. CIV. P. 12(b)(6).

undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). The Federal Rules of Civil Procedure do not, however, require detailed pleading of the facts on which a claim is based. Instead, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief," enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." FED. R. CIV. P. 8(a)(2) (West 2000).

III. DISCUSSION

The Court first considers Defendants' argument that NTI's status as a Chapter 7 debtor precludes its claims against Defendants. The commencement of a case under the Bankruptcy Code creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." See 11 U.S.C. § 541(a)(1) (West 2000). The appointment of a Chapter 7 trustee results in his becoming the sole representative of the debtors' estate. See Landsberry v. Video Miners, Inc., 177 B.R. 49, 55 (W.D. Pa. Jan. 19, 1995). As trustee, he becomes the successor-in-interest to all pre-petition causes of action belonging to debtors. See *id.* Once that interest passes to the trustee, only the trustee can prosecute the cause of action. See *id.* The trustee, with the court's approval, may employ one or more

attorneys that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties. See 11 U.S.C. §

327(a); Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F.Supp. 813, 839-40 (E.D. Pa. Oct. 14, 1993).

Here, while it is true that Plaintiffs' Complaint was filed prior to commencement of the Chapter 7 case and that the trustee solely holds the power to prosecute the case, Plaintiffs assert, in their Reply to Defendants' Motion to Dismiss, that Thomas Grimmett, the United States Trustee for the United States Bankruptcy Court for the District of Nevada expressly approved Plaintiffs' counsel to continue to prosecute this action on behalf of the United States Trustee. See Pls.[''] Reply to Motion of Defendants RSL COM USA, Inc. and Long Distance Management Systems Inc. to Dismiss All of the Counts of Plaintiffs' Complaint, at 3-4. In fact, this Court entered an Order on August 3, 2000 which granted NTI's motion to substitute the United States Trustee on behalf of the bankrupt estate of NTI as the real party in interest. Accordingly, it is impossible to assert that no relief could be granted when taking all facts in Plaintiffs' pleadings as true. Thus, Defendants' motion to dismiss on these grounds is denied.

The Court next considers Defendants' argument that NTI's settlement with OSBI precludes Plaintiffs' claims against Defendants. In deciding this motion to dismiss, consideration of the settlement agreement is appropriate because Plaintiffs' claims are based, in part, upon the settlement agreement. Although the plain language of Rule 12(b) seems to require conversion of a case

to a motion for summary judgment whenever a district court considers materials outside the pleadings, a court may consider certain narrowly defined types of material without converting the motion to dismiss. See *In Re: Rockefeller Center Properties, Inc. Securities Litigation*, 184 F.3d 280, 287 (3d Cir. 1999) (holding that court can consider "'document integral to or explicitly relied upon in the complaint.'"). In *PBGC v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993), the Third Circuit decided that a district court may examine an "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." The rationale for these exceptions is that "the primary problem raised by looking to documents outside the complaint--lack of notice to the plaintiff--is dissipated '[w]here plaintiff has actual notice ... and has relied upon these documents in framing the complaint.'" *Watterson v. Page*, 987 F.2d 1, 4 (1st Cir. 1993). Because NTI relied on the settlement agreement between itself and OSBI approved by the Bankruptcy Court, the Court in this instant action will consider the terms of the settlement agreement in deciding this point.

Here, the settlement between OSBI and NTI was approved by Judge Robert Clive Jones of the United States Bankruptcy Court for the District of Nevada on March 11, 1999. See Order Re: Motion to Approve Settlement of Claims Between OSBI and NTI, at 1. A

"Memorandum of Understanding" was executed by OSBI and NTI in order to memorialize the terms of the settlement agreement. See Memorandum of Understanding, at 1. Part IV , titled "Execution of Releases," provides that the "[p]arties shall execute Joint Releases and Waivers regarding all known and unknown claims between the Parties. The Parties agree to draft Releases that will be without prejudice to [NTI]'s rights to pursue litigation against RSL/LDM." See id. at 3. The next provision in the agreement, titled "Claims against RSL/LDM" states, "[t]he Releases referred to in part IV above are not intended to, and do not constitute a release of any claim by the parties which they may have against RSL/LDM directly, indirectly or derivatively through each respective party and that both parties preserve their rights accordingly." See id. Because the settlement agreement between OSBI and NTI explicitly states that it should does not "constitute a release of any claim by the parties which they may have against RSL/LDM directly, indirectly or derivatively," this court cannot say that it is certain that no relief could be granted under any set of facts that could be proved. Accordingly, the Defendants' motion to dismiss the Plaintiffs' Complaint because of NTI's settlement with OSBI is denied.

The Court next considers Defendants' argument that the Plaintiffs have failed to state a claim in each of the Counts of its Complaint.

As an initial matter, the parties do not adequately address choice of law issues in their briefs. Defendants assert that it is unclear whose law is to be applied as to Plaintiffs' claims because Plaintiffs' Complaint lacks any factual allegations that might indicate which jurisdiction has the most significant connection to Plaintiffs' claims. See Memo. of Law in Support of Defendants RSL COM U.S.A., Inc. and LDM Systems, Inc.'s Motion to Dismiss Plaintiffs' Complaint, at 12. Defendants, however, did analyze Plaintiffs' claims under both New York and Pennsylvania law. See *id.* In Defendants' Reply Memorandum of Law, they go further, asserting that the facts warrant an application of New York law. Two of the contracts that Plaintiffs assert are "at issue" contain provisions that designate New York law as the choice of law. See Reply Memo. of Law in Further Support of Defts. Motion to Dismiss, at 7. Plaintiffs' claim that the choice of law question should await discovery. See Pls['] Reply to Motion of Defts['] RSL COM USA, Inc. and Long Distance Management Systems, Inc. to Dismiss All of the Counts of Plaintiffs' Complaint, at 2. The parties otherwise fail offer much guidance on which state's law should apply eight counts in Plaintiffs' Complaint.

In diversity cases, federal courts apply the substantive law of the forum state. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1940); *Borman v. Raymark Indus.*, 960 F.2d 327, 331 (3d Cir. 1992). A federal court sitting in diversity looks to the choice of law

rules of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir. 1996). Because this Court is in Pennsylvania, this Court looks to the choice of law rules that a Pennsylvania court would apply. See *LeJeune*, 85 F.3d at 1071.

Where no effective choice of law has been made by the parties, courts in the Third Circuit interpret Pennsylvania law to require a two-step inquiry into applicable law. See *Pheonix Four Grantor Trust #1 v. 642 North Broad Street Assocs.* No. Civ.A.00-597, 2000 WL 876728, *4 (E.D. Pa. June 29, 2000); *LeJeune*, 85 F.3d at 1071; *Kirby v. Lee*, Civ.A.No. 98-6483, 1999 WL 562750, at *1 (E.D. Pa. July 22, 1999). The choice of law analysis must be conducted with respect to the particular issues presented, such that different law may apply to different causes of action. See generally *DuSesoi v. United Ref. Co.*, 540 F.Supp. 1260, 1266-68, 1272-73 (W.D. Pa. 1982) (analyzing choice of law separately as to breach of written contract, breach of oral contract and fraud); *RESTATEMENT (SECOND) CONFLICTS OF LAW* §§ 145 (limiting tort analysis to the "particular issue"), 188 (limiting contract analysis to the "particular issue").

The first step requires determining whether an actual conflict exists. If the different laws do not produce different results, then courts presume that the law of the forum state shall apply. See *McFadden v. Burton*, 645 F.Supp. 457, 461 (E.D. Pa. 1986); see

generally Borman, 960 F.2d at 331 (noting that law of the forum state applies in diversity cases). Where there is no difference between the laws of the forum state and those of the foreign jurisdiction, there is a "false conflict" and the court need not decide the choice of law issue. See *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1984) ("If the foreign law to which the forum's choice-of-law rule refers does not differ from that of the forum on the issue, the issue presents a 'false conflict.'"); *Lambert v. Kysar*, 983 F.2d 1110, 1114-15 (1st Cir.1993) ("We need not resolve the [conflict of law] issue . . . as the outcome is the same under the substantive law of either jurisdiction."). If there is a true conflict, the court determines which state has the greater interest in the application of its law. See *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir. 1996).

As will be seen below, the Court is confronted with identical results in Counts I, III, V and VII. Thus, the Court presumes Pennsylvania law applies to these claims. In Counts II, IV, VI and VIII, however, the law of New York and Pennsylvania conflict and thus the Court must decide which state has the greater interest in the application of its law.

A. Count I: Common Law Fraud

In Count I of the Plaintiffs' Complaint, Plaintiffs allege that in order to induce Plaintiff to organize sub-agent

telemarketing rooms to sell the One Step Billing Program, the Defendants supplied Plaintiff NTI with data and information that misrepresented the performance of the One Step Billing Program and the Verbal LOA program. See Pls['] Complaint ¶¶ 98-99. Both New York and Pennsylvania define common law fraud as a material misrepresentation of an existing fact, along with scienter, justifiable reliance on the misrepresentation and damages. See *Booze v. Allstate Ins. Co.*, 750 A.2d 877, 880 (Pa. Super. 2000); *CFJ Assocs. Of New York, Inc. v. Hanson Indus.*, 711 N.Y.S.2d 232, 234 (N.Y. App. Div. 2000). Here, because there is no conflict between New York and Pennsylvania law, the Court considers Defendant's motion to dismiss under Pennsylvania law. See *Pheonix*, 2000 WL 876728, at *3.

In Count I, Plaintiffs allege common law fraud by the Defendants. Under Federal Rule of Civil procedure 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b) (West 2000). The Third Circuit has stated the purpose of Rule 9(b) is simply to put the other party on notice that fraud is being alleged and to ensure that enough information is presented to which a party can suitably respond. See *Greto v. Radix Systems, Inc.*, No. Civ.A. 93-6910, WL 73762, at *2 (E.D. Pa. March 10, 1994). Courts have required that

a party must state the time, place and content of the misrepresentation, the facts misrepresented and what was obtained or given up as a consequence of the fraud, although the Third Circuit has stated it is not necessary to do so. See *id.*

Here, Plaintiffs' Complaint alleged that in May 1997 in Valley Forge, Pennsylvania, Defendant Steiner introduced Plaintiff NTI to the Verbal L.O.A. program that Defendant LDM had been operating. See Pls[''] Complaint ¶ 37. Further, the Complaint alleges that at the time Defendant Steiner advised he would prepare spreadsheets which would accurately reflect the success of LDM's experience with Verbal L.O.A. See *id.* In July 1997, Defendant Sollinger traveled to Philadelphia, Pennsylvania to attend a trade show at which time him personally presented Excel spreadsheets prepared by Defendant Steiner. See *id.* ¶ 38. The Plaintiffs ultimately discovered that these spreadsheets contained inaccurate information. See *id.* Furthermore, Plaintiffs allege that Defendant McCrossen made three visits to the Philadelphia area during which he attested to the data provided by Defendants' Steiner and Sollinger and also provided his own data. See *id.* ¶ 40. The Court concludes that these facts demonstrate Plaintiffs' Complaint has plead with particularity facts stating a case for common law fraud. Thus, based on the Plaintiffs' Complaint, the Court concludes that Defendants RSL and LDM have not established that no relief could be

granted under these facts taken as true. Accordingly, the Court denies Defendants' motion to dismiss Count I.

B. Count II: Conspiracy to Defraud

In Count II of their Complaint, Plaintiffs allege that Defendants Sollinger and Steiner conspired to control and manipulate Promark and OSBI in order to present the information created by Defendant Steiner as if it reflected the actual performance of the corporate Defendants selling the Verbal L.O.A. program. See *id.* ¶ 112.

Here, there is a true conflict of law between Pennsylvania and New York law. Pennsylvania law requires that in order to state a cause of action for civil conspiracy, a plaintiff must show that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. See *Brinich v. Jencka*, 757 A.2d 388, 403 (Pa. Super. 2000). New York, however, does not recognize civil conspiracy as actionable. See *Danahy v. Meese*, 446 N.Y.2d 611, 614 (N.Y. App. Div 1981). New York law does not recognize civil conspiracy because under New York's jurisprudence, if a conspiracy cause of action is allowed, a plaintiff, having recovered on a substantive tort, would then be permitted a duplicative recovery on the conspiracy cause of action with the proof of nothing other than an agreement. See *id.* Pennsylvania alternatively believes such behavior is actionable. Both jurisdictions' governmental interests would be harmed because

one jurisdiction allows recovery while the other forbids recovery. Thus a true conflict exists and the Court must determine which state has the greater interest by considering (1) the place the injury occurred, (2) the place where the conduct occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship is centered. See *Schulgen v. Stetson School*, No. Civ.A. 99-4536, 2000 WL 352366, *2 (E.D. Pa. April 3, 2000). In performing this analysis, the Court considers the quality of contact, rather than their quantity. See *id.*

Here, the place of fraudulent behavior allegedly took place in Pennsylvania. Although Plaintiff's Complaint is not clear, presumably injury was suffered in Pennsylvania because it is the principle place of Plaintiffs' business. NTI has its principal place of business in Philadelphia, Pennsylvania and is incorporated in Nevada. The same is true for Plaintiff NTM. Plaintiff Heider Communications has its principal place of business and is incorporated in Colorado. Defendant RSL has its principal place of business in New York and is incorporated in Delaware. Defendant LDM is a wholly owned subsidiary of RSL. Defendant Promark has its principal place of business in Florida and incorporated in Florida. Defendants Sollinger and Steiner are residents of Florida. The Plaintiffs operate their telemarketing room in Philadelphia, Pennsylvania and Defendants Sollinger and Steiner visited

Pennsylvania in an effort to persuade Plaintiffs to get involved in Defendants One Step Billing Program. Based on the numerous and qualitative contact with Pennsylvania, the Court concludes, that Pennsylvania has the greater interest and Pennsylvania law will be applied accordingly.

Turning to Plaintiffs' Complaint, it alleges that Defendants Sollinger and Steiner acted together to present information created by Steiner to reflect the performance of the Defendants in selling the Verbal L.O.A. program. See Pls[''] Complaint ¶ 111-12. In addition to Plaintiffs' allegations of agreement, Plaintiffs allege in Count I that the information was fraudulently misrepresented by these same Defendants. As a result, taking the facts as true as pleaded by the Plaintiffs, the Court concludes that Plaintiffs have alleged facts showing agreement by Defendants to commit fraud. Thus, Defendants have not established that no relief could be granted. Accordingly, the Court denies Defendants' motion to dismiss Count II.

C. Count III: Tortious Interference with Contractual Relations

In Count III, Plaintiffs allege that Defendants RSL, LDM, Sollinger, Steiner, McCrossen and Promark intentionally interfered with the contractual obligations of Plaintiffs and OSBI. See Pls[''] Complaint ¶ 122.

Both New York and Pennsylvania require similar showings in order to establish a tortious interference with contractual

relations. Under Pennsylvania law, one who intentionally and improperly interferes with the performance of a contract between another and a third person by causing the third person not to perform the contract is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. See *Maier v. Maretti*, 671 A.2d 701, 707 (Pa. Super. 1996). Similarly, under New York law, a plaintiff must show the existence of a valid contract between himself and a third party, the defendant's knowledge of the contract, defendant's intentional inducement of a third party to breach that contract and damages. See *Murray v. Sysco Corp.*, 710 N.Y.S.2d 179, 181 (N.Y. App. Div. 2000). Because there is no conflict, the Court will evaluate the motion to dismiss this claim under Pennsylvania law.

Plaintiffs allege that Defendants LDM, RSL and Promark by and through the actions of Defendants Sollinger, McCrossen and Steiner tortiously interfered with OSBI and Plaintiffs. See Pls['] Complaint ¶ 122. Plaintiffs allege that Defendants utilized their dominion over OSBI and the Plaintiffs to restrict access by the Plaintiffs to critical information concerning "provisioning" of accounts, rejection rates, traffic generation data and profits so that Defendants could create a web of confusion that would permit it to steal customers generated through the fruits of the Plaintiffs' labor. See *id.* ¶ 123. The Complaint alleges the

tortious interference began when Defendants provided fraudulent data. See *id.* ¶ 124-28. In particular, Complaint alleges that tortious interference occurred when RSL bought OSBI's entire customer base for a reported \$15 million and failed to disclose this information to Plaintiffs. See *id.* ¶ 127. Also, Defendants wrongfully ceased reporting to OSBI. LDM knew OSBI was required to report to Plaintiffs pursuant to contractual obligations. See *id.* ¶ 127. Based on the facts pleaded by Plaintiffs, the Court concludes that Defendants RSL and LDM have not established that no relief could be granted under these facts taken as true. Accordingly, the Court denies Defendants' motion to dismiss Count III.

D. Count VI: Civil Conspiracy to Tortiously Interfere

In Count IV of Plaintiffs' Complaint, all Defendants are alleged to have conspired to tortiously interfere. See *id.* ¶ 132. As discussed above in conjunction with Count II, Pennsylvania and New York differ regarding civil conspiracy as an independent cause of action. New York does not recognize this as a cause of action and Pennsylvania does. Following the interest analysis above, the Court again finds that Pennsylvania law shall apply to this Count.

Under Pennsylvania law, in order to state a cause of action for civil conspiracy, a plaintiff must show that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. See *Brinich*, 757 A.2d at 403. Here, Plaintiffs' Complaint alleges that in order to

achieve the tortious interference, Defendants Sollinger, Steiner and McCrossen agreed to perform the acts which Plaintiffs allege constitute tortious interference. See Pls['] Complaint ¶ 132. Under Count III, the Court concluded that Plaintiffs pleaded sufficient facts to provide notice of a tortious interference claim. Plaintiffs have further plead facts showing agreement by Defendants. Taking the facts as true as pleaded by the Plaintiff, this the Court concludes that Defendants RSL and LDM have not established that no relief could be granted. Accordingly, the Court denies Defendants' motion to dismiss Count IV.

E. Count V: Unlawful Conversion of Assets

In Count V of Plaintiffs' Complaint, Plaintiffs alleges Defendants LDM, RSL, OSBI, Sollinger, McCrossen and Steiner converted ANIs or customers produced by Plaintiffs. See Pls['] Complaint ¶ 137. Under Pennsylvania law, conversion is a tort by which the defendant deprives the plaintiff of his right to a chattel or interferes without the plaintiff's consent and without lawful justification. See *Chrysler Credit Corp v. Smith*, 643 A.2d 1098, 1100 (Pa. Super. 1994). Similarly, under New York law, conversion is any unauthorized exercise of dominion or control over property which interferes with and is in defiance of a superior possessory right of another in the property. See *Hart v. City of Albany*, 706 N.Y.S.2d 535, 536 (N.Y. App. Div. 2000).

Because there is no conflict between Pennsylvania and New York law

here, the Court will evaluate the motion to dismiss this claim under Pennsylvania law.

Here, Plaintiffs' Complaint alleges that LDM manipulated reporting and or concealed critical information concerning reporting in order to carry out its plan to steal ANIs and customers generated by Plaintiffs. See Pls['] Complaint ¶ 142. In essence, Plaintiffs allege that Defendants stole the customers and assets generated by Plaintiffs. See id. ¶ 23. Plaintiffs' Complaint incorporates by reference the civil action complaint and amended complaint titled One Step Billing, Inc. v. LDM Systems Inc. and RSL COM USA. See Pls['] Complaint, ex. F, at 6. Among other things, the complaint alleges that LDM concealed ANIs or customers which were obtained and for which it was required to report to OSBI and compensate OSBI. See id. Plaintiffs believe that this failure to report and compensate interfered in their right, without their consent, to those ANIs or customers. Based on these facts, the Court concludes that Defendants have not established that no relief could be granted. Accordingly, the Court denies Defendants' motion to dismiss Count V.

F. Count VI: Civil Conspiracy to Convert Plaintiff's ANIs

In Count VI of Plaintiffs' Complaint, Defendants are alleged to have conspired to convert Plaintiffs' ANIs. See id. ¶ 146. As discussed above in conjunction with Count II, Pennsylvania and New York differ regarding civil conspiracy as an independent cause of

action. New York does not recognize this as a cause of action and Pennsylvania does. Following the interest analysis above, the Court finds that Pennsylvania law shall apply to this Count.

Here, Plaintiffs' Complaint alleges Defendants agreed to convert the Plaintiffs' ANIs by agreeing to assist each other in concealing the paper trial. See Pls['] Complaint ¶ 147. Specifically, the Complaint alleges Defendants Steiner and Sollinger used their control and domination of the corporate Defendants to create reporting difficulties and confusion so as to cover up evidence that they were unlawfully stealing revenues generated by the Plaintiffs. See *id.* They allegedly did this in order to build OSBI, increase the value of the company and ultimately derive substantial personal gain upon the sale of the business in October 1998. See *id.* Based on these facts, as pleaded by the Plaintiff, this the Court concludes that Defendants have not established that no relief could be granted. Accordingly, the Court denies Defendants' motion to dismiss Count VI.

G. Count VII: Third Party Beneficiary Breach of Contracts

In Count VII, Plaintiffs allege that LDM and subsequently RSL, through its successor status, were contractually tied in to the performance of Plaintiff and its sub-agents. See *id.* ¶ 153. Under Pennsylvania law, a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself. See *Scarpitti v. Weborg*,

530 Pa. 366, 372-73 (Pa. 1992). This is true unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. See *id.* at 373.

Similarly, under New York law, a third party seeking to recover on a contract must establish that a binding contract exists between other parties; that a binding contract was intended for his benefit and that the benefit to him was direct rather than incidental. See *Internationale Nederlanden (U.S.) Capital Corp., v. Bankers Trust Co.*, 261 A.D.2d 117, 123 (N.Y. App. Div 1999). Further, it is not essential to the creation of a right in a creditor beneficiary that he be identified when the obligation is made. See *id.* Because there is no conflict between New York and Pennsylvania law, the Court will evaluate the motion to dismiss this claim under Pennsylvania law.

Here, Plaintiffs allege that they solicited business pursuant to OSBI's program. See Pls['] Complaint ¶ 154. LDM was responsible for all facets of "provisioning" through billing and collections. See *id.* All business generated by Plaintiffs was passed on LDM's system network. See *id.* OSBI was the largest agent of LDM and was not itself a telemarketing room. See *id.*

Furthermore, LDM knew that OSBI could only sell that telemarketing program through the efforts of agents and sub-agents including Plaintiffs. See *id.* In order to sign on to this program with OSBI, Plaintiffs were required to place traffic on the LDM network. Accordingly, to the extent OSBI alleges that RSL and LDM concealed and converted millions of dollars, Plaintiffs assert these claims as third party beneficiaries. See *id.* The Court concludes that Plaintiffs have plead sufficient facts to place Defendants on notice of their claim as third party beneficiaries. As a result, Defendants have not established that no relief could be granted under these facts taken as true. Accordingly, the Court denies Defendants' motion to dismiss Count VII.

**H. Count VIII: Conspiracy to Cheat, Hinder and Delay Plaintiff
NTI's Collection of Court Approved Judgment in Bankruptcy
Court Proceedings**

Plaintiffs' final Count alleges conspiracy to cheat, hinder and delay Plaintiff NTI's collection of court approved judgment in bankruptcy court proceedings. See *id.* ¶¶ 160-74. While it is not clear what cause of action Plaintiffs purport to claim, it is well settled that to survive a 12(b)(6) motion to dismiss, the pleading need not correctly categorize legal theories giving rise to the claims and the Court is under a duty to examine the pleadings to determine if the allegations provide for relief under any theory. See *Advanced Power Systems v. Hi-Tech Systems, Inc.*, 801 F.Supp. 1450, 1460 (E.D. Pa. Aug. 3, 1992); 5A C. Wright & A. Miller,

Federal Practice and Procedure, § 1357, at (1990). As discussed above in conjunction with Count II, the Court will apply Pennsylvania law to a civil conspiracy claim.

Here, the Court construes Plaintiffs claim to state a cause of action under this count for tortious interference with contractual relations. Under Pennsylvania law, one who intentionally and improperly interferes with the performance of a contract between another and a third person by causing the third person not to perform the contract is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. See *Maier v. Maretti*, 671 A.2d at 707.

Here, the contract is the Bankruptcy Court approved settlement agreement. See Defts['] Motion to Dismiss, exhibit 3. Plaintiffs' Complaint alleges that despite a Bankruptcy court approved settlement, neither LDM nor OSBI had any intention or expectation that it would continue to report income and make remittances to the Plaintiffs as both LDM and OSBI were contractually obligated to do. See *id.* ¶ 168. In fact, the entire customer base was sold in one lump sum which was concealed from Plaintiffs and the Bankruptcy Court. See *id.* Out of the \$15.1 million purchase price reported in RSL's annual filing only \$5.25 was reported as a sale of business assets on OSBI's corporate tax return. See *id.* The Complaint alleges that Defendants Sollinger and Steiner received

portions of this unaccounted money. See *id.* ¶¶ 168-69. Based on these allegations, the Court concludes that Plaintiffs have sufficiently pleaded allegations to warrant a finding that Defendants intentionally and improperly interfered with the performance of a contract between Plaintiffs and OSBI by causing OSBI not to perform the contract. As a result, Defendants RSL and LDM have not established that no relief could be granted under these facts taken as true. Accordingly, the Court denies Defendants' motion to dismiss Count VIII.

A final assertion in the instant Motion of Defendants RSL and LDM is that Plaintiffs have not sufficiently alleged any basis to impose liability upon either RSL or LDM for the purported actions of the other Defendants. The Court rejects this argument on two grounds.

First, during the time period covered in Plaintiffs Complaint, Defendants Sollinger, Steiner and McCrossen were either officers or directors of the Defendant LDM. See Pls['] Complaint ¶¶ 30-31. A corporation is a creature of legal fiction and must act through its officers, directors and agents. See *Nat'l Risk Mgmt., v. Bramwell*, 819 F.Supp. 417, 433 (E.D. Pa. Mar. 31, 1993); *Lokay v. Lehigh Valley Co-op Farmers, Inc.*, 492 A.2d 405, 408 (Pa. Super. 1985). Further, a corporation is bound by its agent's acts if those acts are performed within agent's implied or apparent scope of authority. See *id.* In addition, all acts of a corporation are

necessarily executed by its officer, employees or other agents and a corporation may be vicariously liable for such acts. See *Builders Square, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. Civ.A.95-164, 1995 WL 476246, *3 (E.D. Pa. Aug. 9, 1995).

Here, Defendant Sollinger was, at all times pertinent to the claims in Plaintiffs' Complaint, Vice-President of LDM and was the sole shareholder in OSBI. See Pls['] Complaint ¶ 28. Defendant Lou Steiner was, at all times pertinent to the claims in Plaintiffs' Complaint, involved in Defendant corporations in various capacities, including principle of LDM. See *id.* ¶ 29. Defendants Steiner and Sollinger controlled corporate Defendant LDM prior to its purchase by RSL. See *id.* ¶ 30. Also, Defendant McCrossen was, at all times pertinent to Plaintiffs' claims, a shareholder and Vice-President of LDM who provided assistance to Defendants Steiner and Sollinger in carrying out the acts alleged in Plaintiffs' Complaint. See *id.* at 31. Considering the acts of individual human defendants can lead to corporate liability, albeit vicariously, the Court finds no merit in Defendants' RSL and LDM argument that there is no basis to find Defendants are liable for acts alleged in Plaintiffs' Complaint.

A second reason for rejecting Defendants assertion stems from RSL's potential successor liability. Successor liability concerns RSL's purchase of OSBI's customer base in October 1998. See Pls['] Complaint ¶ 87. At common law, when one company sells or transfers

all its assets to another, the successor company does not embrace the liabilities of the predecessor simply because it succeeded to the predecessor's assets. See *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 565 (3d Cir. 1997). There are, however, exceptions to this general rule. See *id.* The exception invoked by Plaintiffs is where the transaction intended to fraudulently escape liability. See *id.*

Here, Plaintiffs allege that OSBI's entire customer base was apparently purchased by RSL in October 1998. See Pls['] Complaint ¶ 87. The Complaint further alleges that this money is owed to the Plaintiffs. See *id.* Moreover, OSBI concealed this transaction from the Bankruptcy court when it represented that it was having difficulty securing reporting from LDM. See *id.* ¶ 90. Plaintiffs assert that it was without knowledge of this transaction that it agreed to a settlement before the Bankruptcy Court. See *id.* ¶ 94. After this sale, the Plaintiffs allege that Defendants Sollinger and Steiner syphoned off OSBI's assets which resulted in OSBI's abandoning of the Bankruptcy approved settlement with NTI. See *id.* Based on the facts in Plaintiffs' Complaint, sufficient acts of fraud have been alleged. Thus, it cannot be said that the Complaint has failed to state a claim upon which relief can be granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOVA TELECOM, INC.,	:	CIVIL ACTION
NOVA TELEMARKETING, INC. d/b/a	:	
COMMERCE TELESERVICES, INC. and	:	
HEIDER COMMUNICATIONS, INC.	:	
	:	
v.	:	
	:	
LONG DISTANCE MARKETING	:	
SYSTEMS, INC., RSL COM USA, INC,	:	
as Successor to LONG DISTANCE	:	
MANAGEMENT, INC., and in its	:	
own right, LOU STEINER, ONE	:	
STEP BILLING, INC., NEIL	:	
SOLLINGER, TOM MCCROSSEN and	:	
PROMARK COMMUNICATIONS, INC.	:	
a/k/a MADISON COMMUNICATIONS, INC.	:	NO. 00-2113

O R D E R

AND NOW, this 25th day of October, 2000, upon consideration of Defendants RSL COM U.S.A., Inc. and LDM Systems, Inc.'s Motion to Dismiss all of the counts of Plaintiffs' Complaint (Docket No. 4), Plaintiffs' Reply to Defendants' Motion to Dismiss (Docket No. 11) and Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss Plaintiffs' Complaint (Docket No. 15), IT IS HEREBY ORDERED that said Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.